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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RICHARD GOMEZ, Defendant and Appellant.	B225128 (Los Angeles County Super. Ct. No. NA076108)

APPEAL from a judgment of the Superior Court of Los Angeles County, James D. Otto, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Blythe J. Leszkay and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Gomez appeals from his judgment of conviction for murder and attempted murder, with firearm special allegations. He raises several claims of evidentiary error: the exclusion of a letter purportedly written by his brother; admission of a hearsay statement as an adoptive admission; and admission of evidence of prior uncharged acts to prove a common plan, scheme and intent. He also argues the trial court should have granted a mistrial after a prosecution witness disclosed to the jury that she was a probation officer although the trial court had previously ruled that such evidence was inadmissible.

We conclude the trial court erred in admitting evidence of one prior uncharged act, but that this error was harmless. No other error occurred. We shall affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

This case arose from an attempted drug buy which was interrupted by three or four young shooters. The would-be drug purchaser was killed and her companion wounded. As we describe, evidence was presented that the drug seller had arranged with appellant and other gang associates to interrupt the buy for the purpose of robbing the buyer.

Juan Coronado was a close friend of Mary Castro. In April 2007, both were living in San Diego. On April 28, 2007, they drove from San Diego to Los Angeles so Castro could acquire PCP, which they had done many times before. Castro's usual seller was unable to provide the PCP she wanted. Castro made phone calls to find another seller and was given a telephone number for Melanie Gandara. Castro and Coronado met Gandara at a bar. Coronado had never met her before. Gandara told Castro she could make the sale the following afternoon, then left. Coronado and Castro went to Long Beach, drank beer and smoked PCP which they obtained at the bar. They met Gandara the next day at the parking lot of a Hooters restaurant.

In April 2007, Albert Sanchez was having an affair with Gandara. He knew that she sold PCP. Sanchez was then a member of the East Side Wilmas gang from Wilmington, but was no longer a member at the time of trial. Sanchez met Gandara

about 11:00 a.m. on April 29, 2007. He had not seen her the night before. Gandara told him that she needed to drop something off to somebody she was meeting.

Sanchez and Gandara met Castro and Coronado in the parking lot of a Hooters restaurant in Long Beach, at about 12:30 p.m. the same day. Gandara spoke with Castro and Coronado, introduced Sanchez, and said she was going to her grandmother's house to drop off herchildren who were with her. After dropping off the children, all four went to a bar and stayed there for some hours.

Gandara told Sanchez to drive with her to a drug store parking lot so she could meet someone to pick up drugs. They did so, with Castro and Coronado following in their car. It was then between 5:30 p.m. and 6:30 p.m. Then they drove around while Gandara was on the phone. Next they went to the Athletic Center in Wilmington, but did not stay because Sanchez wanted to get something to eat. They got food to go, then Castro went to get gas while Sanchez waited. Then they went back to the Athletic Center. Both cars parked in the parking lot. Gandara got out of the car and went behind it. Sanchez started to get out of the car, but stopped at the front of his door. Castro remained in her car while Coronado got out and stood by the Castro car.

Sanchez heard someone say, "'What the fuck.'" He thought Coronado said it. When he looked up Sanchez saw three people standing in front of Castro's car. At first, Sanchez did not recognize the three men. They were Hispanic. One of the men started shooting toward Sanchez. Sanchez was behind Castro's car, but neither he nor his car was hit. Castro's car went into reverse and out the front gate. Sanchez backed up and saw Castro's car scrape against a curb and come to a stop. Coronado ran for help. Sanchez heard six or seven shots. He called to Gandara, but she ran away. He then drove out of the parking lot. Sanchez identified appellant as the only shooter. Castro died at the scene from gunshot wounds. Coronado was wounded.

Sanchez drove slowly around the block in his Impala, with the windows down, yelling for Gandara. He saw her get into the passenger side of another car and drive off. Appellant jumped into the front passenger seat of Sanchez's car, while Ruben Centeno and Oscar Rubalcava got into the back seat. Appellant was holding a black

semiautomatic gun with a tip on it like a laser. Appellant told Sanchez to keep quiet and pointed the gun at him. Sanchez knew Centeno and Rubalcava. The parties stipulated that Centeno was appellant's brother.

Still worried about Gandara, Sanchez drove to her house, which was less than a mile away. At the house, Sanchez saw Gandara getting out of the car. Appellant, Centeno, and Rubalcava got out of Sanchez's car. Gandara yelled, "'What the fuck?'"

On May 7, 2007, Los Angeles County Sheriff deputies came into contact with appellant.[1] Deputy Andre Kneubuhler saw appellant take a firearm from his waistband and throw it over his shoulder. The deputy recovered the firearm, which was loaded, and booked it into evidence together with two magazines containing bullets. A ballistics expert compared the casings recovered from the Castro shooting scene with the firearm recovered on May 7, 2007 from appellant and concluded that the casings were fired from that weapon.[2] The jury heard recordings of telephone calls made by appellant from jail in which he attempted to arrange an alibi. He also complained about someone snitching on him about the crimes and, in this context, gave details from Sanchez's testimony at the preliminary hearing.

Appellant was charged with the first degree murder of Castro (Pen. Code, § 187, subd. (a) (count 1)) and the attempted willful, deliberate and premeditated murder of Coronado (Pen. Code, § 664/187, subd. (a) (count 2)). Special firearm allegations were alleged as to both counts. (Pen. Code, §§ 12022.53, subds. (b)-(d); 12022.53, subds. (b) through (e)(1).) The first amended information alleged that appellant was at least 16 years of age at the time the offenses were committed and that they were committed for

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[1] Appellant and Centeno, in a stolen car, engaged in a pursuit with sheriff's deputies and were arrested on May 7, 2007. Centeno identified himself to the deputies as Ronny Reyes. The record reflects that the jury was not informed about the stolen car or the pursuit.

[2] He was unable to reach a conclusion as to whether the bullets recovered were fired from that weapon.

the benefit of a criminal street gang under Penal Code section 186.22, subdivision (b)(1)(C). Two prior felony convictions resulting in prison terms were also alleged. Appellant pled not guilty and denied the special allegations. The jury found him guilty as charged and found true the firearm allegations under Penal Code section 12022.53, subdivisions (b) and (d).[3] Appellant was sentenced to a term of 50 years to life on count 1 and a term of life plus 25 years on count 2. This timely appeal followed.

DISCUSSION

I

Appellant argues the trial court erred in denying his motion to present a letter purportedly written by his deceased brother Centeno, as a statement against penal interest pursuant to the Evidence Code section 1230 hearsay exception.[4]

A. Trial Court Proceedings

After the prosecution rested, and near the end of the defense case, defense counsel moved for the admission of a letter purportedly written by Centeno. He explained that while at the home of appellant's mother, he was presented with a box of Centeno's personal effects. Defense counsel examined the contents, looking for photographs depicting tattoos on the back of Centeno's neck, an issue pertinent to identification of the shooter. Counsel said he found the letter while going through this box. Appellant and respondent agree on the text of the letter offered as a declaration against Ruben Centeno's penal interest:[5] "To whom it may concern, [¶] My name is Ruben Centeno. I was commited to the California Youth Authority on April of 2004 for Armed Robbery. I

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[3] The jury was not asked to make findings on the other firearm allegations.

[4] All further statutory references are to the Evidence Code.

[5] The letter is cited as "Court Exhibit 5", which is not in the record on appeal. The motion to admit the letter paraphrases the contents.

robbed a man for his money with one other ex-friend to support my drug habit. I recently violated parole for smoking, giving a false name to police officers, being a passenger in a stolen car, being around gang members, being involved in a high speed chase, having a loaded firearm in my control, abscoudning [*sic*] and leaving an approved placement. When I was paroled from YTS I was not yet ready to become productive in society by still partaking in negative behavior. So I ran from Parole and went back to my old lifestyle which was hanging with gang members and doing drugs which led to my arrest on May 7, [20]07. I was in a stolen car with my brother and was involved in a police chase. I was tooken [*sic*] to the county then to YTS and given a drug program because I was high on drugs when arrested. [¶] Ruben Centeno"

In his motion, defense counsel argued that this letter contained the following statements against Centeno's penal interests: 1) he was arrested with appellant on May 7, 2007; 2) at the time, he was running from parole; 3) on that date, he violated parole by being high on drugs, giving a false name to police officers, also being a passenger in a stolen vehicle, and being involved in a high speed chase; 4) on that date he had a loaded firearm in his control. The defense argued that the statement regarding control of a loaded weapon subjected Centeno to criminal liability because Sanchez had placed Centeno at the scene of the shooting and one week later Centeno was in control of the weapon which fired the casings recovered from the scene of the shooting. Alternatively, the defense motion argued that Centeno's statements "about all his crimes created a risk of making him an object of hatred, ridicule, or social disgrace in the community that a reasonable man in his position would not have made the statement unless he believed it to be true."

The trial court questioned the foundation for Centeno's letter. Defense counsel said Centeno's mother would identify his handwriting. The court noted that the letter was addressed to "To whom it may concern," was written in pencil, and had a printed, rather than a cursive, signature. The prosecution objected to admission of the letter. It argued that the phrase "firearm in my control" was ambiguous and gave no indication of the circumstances regarding the firearm, or even what firearm was involved. Defense

counsel contended that the statements made by Centeno exposed him to prosecution for the Castro murder. The trial court concluded that the letter was not sufficiently reliable under the circumstances, and that it went to a collateral issue of little or no relevance. The court also ruled, under section 352, that admission of the letter would consume time and be unduly prejudicial. On these grounds, it was excluded.

After the conclusion of the surrebuttal case, defense counsel sought reconsideration of the trial court's ruling excluding Centeno's letter. Defense counsel cited a Department of Youth Authority Case Report, for the Dewitt Nelson Youth Correctional Facility, dated November 24, 2007. Page two of the report sets out a verbatim version of Centeno's letter. Defense counsel argued this was circumstantial evidence that the letter was written to a parole officer for the purpose of a parole hearing. The court indicated that in addition to concerns about the reliability of the letter, it found it difficult to see how the letter was a declaration against Centeno's penal interests. The court emphasized the ambiguity of the phrase about having the firearm "in my control," which the court concluded was a legal term unlikely to be used by Centeno unless suggested to him by someone else. Defense counsel argued that Centeno admitted committing several crimes in the letter. But the court noted that Centeno already had been convicted of those crimes. Defense counsel conceded that point but contended that the admissions still subjected Centeno to public scorn. Under the circumstances, the court concluded that Centeno wrote the letter in an effort to get into a drug program, and defense counsel agreed.

Defense counsel also asked the court to admit the Youth Authority report for a nonhearsay purpose (not identified). But the trial court said this was an effort to bootstrap into admission the contents of Centeno's letter. The final argument by defense counsel was that appellant had a due process right to admission of the letter in order to present his defense. The court again denied admission of the letter.

B. Legal Principles

"Evidence Code section 1230 permits a hearsay statement to be admitted if it 'so far subjected [the declarant] to the risk of civil or criminal liability . . . that a reasonable

man in his position would not have made the statement unless he believed it to be true.' '"The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration. [Citations.] In determining whether a statement is truly against interest within the meaning of Evidence Code section 1230, and hence is sufficiently trustworthy to be admissible, the court may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." [Citation.]' [Citation.]"[6] (*People v. Gonzales* (2011) 51 Cal.4th 894, 933, fn. omitted (*Gonzales*).) The Supreme Court has emphasized that "'"[e]ven when a hearsay statement runs generally against the declarant's penal interest . . . the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission. . . ." [Citation.]'" (*Ibid*, quoting *People v. Geier* (2007) 41 Cal.4th 555, 584.)

The party seeking admission of a statement under Evidence Code section 1230 "'must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character.' [Citations.]" (*People v. Lawley* (2002) 27 Cal.4th 102, 153 (*Lawley*).) "We review a trial court's decision as to whether a statement is against a defendant's penal interest for abuse of discretion." (*Ibid.*) The trial court must first determine, as preliminary facts, that the out-of-court declarant made the statement as represented and that the statement meets certain standards of trustworthiness. The first determination is governed by the substantial evidence rule. (*People v. Cudjo* (1993) 6 Cal.4th 585, 608 (*Cudjo*).)

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[6] Section 1230 provides in pertinent part: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability, or . . . created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

Appellant asserts that the erroneous exclusion of Centeno's letter violated his constitutional rights to due process and a fair trial. The Supreme Court has addressed the question whether evidentiary rulings raise issues of constitutional dimension. In a recent case involving the admissibility of a statement as a declaration against interest, our Supreme Court explained that: "The general rule remains: '"the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice."' [Citation.]" (*Lawley*, *supra*, 27 Cal.4th at p. 155.) We apply that rule here. The issue presented is a standard evidentiary question without constitutional dimension.

C. Analysis

It is undisputed that Centeno had died before trial and therefore was unavailable as a witness. The parties dispute the other two elements of the exception: reliability of the letter, and whether the statements made were against interest.

Appellant argues that the testimony of his mother, Martha Centeno, would have laid an adequate foundation that Centeno authored the letter. Respondent challenges that argument, asserting that Martha Centeno was a known gang member with a "tremendous motive to lie." In addition, respondent describes the circumstances of the discovery of the unsigned and undated letter, by defense counsel, in a box of Ruben's belongings during trial, as "dubious."

We conclude that the proffered testimony of Martha Centeno would have laid an adequate foundation to establish that Centeno authored the letter. That testimony would have been foundational and would not have constituted hearsay. Her gang membership and motive to lie to protect her living son, appellant, went to the weight to be given the letter, a matter for argument.

But the circumstances of the letter are ambiguous. The letter is undated. It appears to be a draft of a letter later submitted to the Youth Authority, in an effort to obtain placement in a drug program, as the trial court concluded. The lynchpin of

appellant's argument is that the letter exposed Centeno to potential prosecution for the Castro murder because he admitted possession of a loaded firearm. As appellant reads the letter, Centeno admitted that he had this firearm in his control when arrested with appellant on May 7, 2007. A ballistics expert matched that firearm to the casings found at the scene of the Castro shooting.

We agree with the trial court that Centeno's letter is too ambiguous to support the interpretation urged by appellant. Although the letter says that Centeno was arrested on May 7, 2007, it does not say that he had the firearm with him on that date. The relevant passage of the letter states: "I recently violated parole for smoking, giving a false name to police officers, being a passenger in a stolen car, being around gang members, being involved in a high speed chase, having a loaded firearm in my control, abscoudning [*sic*] and leaving an approved placement." This statement provides no information about when Centeno was in possession of the weapon and does not state he used it in the commission of any crime, including the shootings of Castro and Coronado. In his opening brief, appellant concedes: "Although it is not clear whether Ruben was stating that he had been in control of the firearm on May 7, 2007, it certainly presented a question of fact for the jury, as to whether Ruben had been in possession of the murder weapon, whether he had given the gun to appellant, and whether he, rather than appellant, had been the shooter." Appellant's argument disregards the rule that before a declaration against interest may be admitted, the trial court must determine that the statements it makes are trustworthy. (*Cudjo*, *supra*, 6 Cal.4th at p. 608.)

Appellant argues that his interpretation of Centeno's statement regarding the firearm is supported by testimony given by his sister, Coreena Gomez, who was also appellant's sister. She testified that Centeno admitted to her that he was at the shooting "and he had the gun." Coreena Gomez did not know what gun Centeno was talking about. Centeno did not say whether or not he had shot the girl. He told her the man with the girl who died was shooting at him, so he shot back. This conversation took place a few days before Centeno died on July 19, 2008. Gomez did not tell anyone, including family, about this conversation, until she was contacted by defense counsel a day or two

before her testimony. Even if credited, we conclude that Gomez's testimony is too vague to compel a conclusion that the firearm which Centeno told her about is the firearm recovered from appellant on May 7, 2007.

Relevant case law supports our conclusion that the trial court did not abuse its discretion in excluding Centeno's letter. In *Gonzales*, supra, 51 Cal.4th at p. 933, the defendant argued that statements by her husband were admissible as declarations against interest. She conceded that the statements did not disclose the true circumstances of the victim's heinous death, but contended nonetheless that they reflected consciousness of guilt. (*Ibid.*) The *Gonzales* court reiterated that "basic trustworthiness and factual truthfulness are required for a statement to qualify for admission under Evidence Code section 1230. [Citation.]" (*Ibid.*) Centeno's letter provides no facts regarding the shootings of Castro and Coronado and thus does not qualify for admission under section 1230.

In *Lawley, supra*, 27 Cal.4th 102, the Supreme Court considered the admissibility of testimony by an inmate about a conversation with Brian Seabourn in prison. Seabourn showed the witness letters purportedly from the Aryan Brotherhood which directed him to commit the murder for which the defendant also was charged. Seabourn was separately convicted of second degree murder. (*In re Lawley* (2008) 42 Cal.4th 1231, 1233.) At Lawley's trial for the same murder, the defense attempted to call the inmate to testify about the content of the letters. The trial court ruled that the letters were double hearsay and that Seabourn's statement that he had been directed to commit the murder by the Aryan Brotherhood was inadmissible because the identity of the party directing the murder was not against penal interest. (*Lawley, supra,* 27 Cal.4th at p. 152.) The Supreme Court concluded that the proffered testimony regarding the unauthenticated letter, prepared under unknown circumstances, and by an unidentified author, "was not shown to be sufficiently reliable to merit admission into evidence." (*Id.* at p. 154.) Here too, we are presented with a letter prepared under unknown circumstances, which is also ambiguous in its content. Under *Lawley*, Centeno's letter was not shown to be sufficiently reliable to warrant admission.

Alternatively, appellant argues Centeno's letter should have been admitted as a statement against social interest under the last provision of section 1230. "California adopted the social interest exception in 1965 as an integral part of the original Evidence Code. (§ 1230; Stats. 1965, ch. 299, § 2, p. 1340.) The intent of the Law Revision Commission, which recommended legislative adoption of the new code, was to make the social interest exception 'sufficiently broad' to admit previously inadmissible statements about illegitimacy, pregnancy out of wedlock, and impotency ([Note, *Sin, Suffering, and* "*Social Interest*": *A Hearsay Exception for Statements Subjecting the Hearsay Declarant to* "*Hatred, Ridicule, or Disgrace*" (1985)] 4 Rev. Litig. [367,] 385, fn. 81): [¶] 'A man admits paternity of an illegitimate child; an unmarried woman states that she is pregnant; a man states that he is impotent. Professor McCormick refers to these statements as declarations against "social interests." Currently such declarations are usually excluded. Under the new rule they would be admitted—in our opinion, wisely so.' (Tentative Recommendation and A Study Relating to the Uniform Rules of Evidence (Aug. 1962) 4 Cal. Law Revision Com. Rep. (1963) p. 501, fns. omitted.)" (*People v. Wheeler* (2003) 105 Cal.App.4th 1423, 1427.)

Our conclusion that Centeno's letter was not sufficiently reliable to warrant admission as a declaration against penal interest also disposes of appellant's argument that it was a statement against social interest. (*Lawley, supra,* 27 Cal.4th at p. 155.) *In re Weber* (1974) 11 Cal.3d 703, is instructive. Weber, an attorney convicted of soliciting another to offer a bribe, petitioned for a writ of habeas corpus based on newly discovered evidence that the person he solicited, Thomas Devins, had framed him. The new evidence proferred by Weber in support was contained in declarations executed by Anderson, a cellmate of Devins. Subsequently Anderson invoked his privilege against self incrimination and became unavailable as a witness. (*Id*. at pp. 712-713.) His declarations were ruled inadmissible. Defendant's theory was that Anderson's statement made him a snitch within the prison community, creating a risk of making Anderson an object of hatred, ridicule or social disgrace in the community within the meaning of section 1230. (*Id*. at p. 721.) The argument was rejected by the Supreme Court. It held

that nothing in the content of the statement reflected adversely on the declarant's character in a way so as to guarantee that it was reliable. (*Ibid.*) The Supreme Court held that both the content of the statement and the fact that it was made must be against the declarant's social interest. (*Id*. at p. 722.) The court also observed that the declarant's statement could have served to benefit him. (*Ibid.*)

The trial court did not abuse its discretion in concluding that Centeno's letter was not admissible as against his social interest. As we have noted, it was unreliable. Besides the fact that Centeno was already on parole, and the letter was either never sent or was a draft of a letter sent to the Youth Authority, there is no indication that it subjected Centeno to ridicule or disgrace in the community.

II

Appellant argues the trial court abused its discretion by allowing the admission of a hearsay statement by Gandara as an adoptive admission.

A. Relevant Proceedings

The defense brought a motion in limine seeking to exclude statements by various witnesses. The statement at issue was by Sanchez, who told police officers that he overheard Gandara tell appellant that he was not supposed to shoot her, which we take to be a reference to Castro. The trial court read the statement into the record from the transcript of the police interview with Sanchez. First Sanchez told the detective that he heard Gandara talking to appellant. The reporter's transcript does not clearly identify who spoke the following lines: "'Was it the next day or two days later—two days after?'" Then the court read: "'Detective Weber: What did she say to him? [¶] 'Albert Sanchez: She said, "You weren't supposed to shoot her." And she told him to get the fuck out of her house.'" Then the court said: "Then it goes on and it says: 'And what did he do?'" The court continued reading: "And it says 'He left.'"

The prosecutor argued the statement was admissible as an adoptive admission. Defense counsel argued there was no indication in Sanchez's statement as to whether or not appellant responded to Gandara's statement. The court ruled that Sanchez would be

allowed to clarify that point at a section 402 hearing, and if he did so, the statement would be allowed as an adoptive admission. Later, before Sanchez testified, outside the presence of the jury, the court explained that Sanchez had to lay the foundation for the adoptive admission by testifying that he saw that appellant was present when Gandara made the statement and whether appellant made any response.

Sanchez then testified at a hearing pursuant to section 402 that he witnessed a conversation between Gandara and appellant either the night of the shooting, the next day, or a few days afterward. The relevant passage of direct examination by the prosecutor reads: "Q. And did she say anything to him about the shooting?" [¶] "A. She said that—let me recall. 'Why did you do that for? Why did you shoot?'" [¶] "Q. Did she say he wasn't supposed to shoot her?" [¶] "A. Right. Somewhere in that fashion, yes." [¶] "A. And was the defendant present when she said it?" [¶] "A. Yes." [¶] "Q. And where were they?" [¶] "A. In the driveway of her house, her mother's house on Rubidoux." [¶] "Q. And did he say anything when she said that?" [¶] "A. No. He left." [¶] "Q. Did she ask him to leave?" [¶] "A. Yeah." The prosecutor asked Sanchez again whether Sanchez said anything in response to Gandara's statement that he was not supposed to shoot her and Sanchez replied: "He didn't say nothing."

On cross-examination at the hearing, Sanchez testified that he pulled up to the driveway when Gandara and appellant were in the middle of a conversation, so he did not hear all of it. He was not in a position to see whether appellant shook or nodded his head in response to Gandara's statement, nor could he see appellant's facial expressions. Defense counsel argued the statement should be excluded under section 352 as more prejudicial than probative since Sanchez did not hear the entire conversation and could not see any nonverbal response by appellant. The prosecutor argued that the matters raised by defense counsel could be elicited in cross-examination and argued in closing statements. The court ruled that the statement would be admitted as an adoptive admission and that the probative value outweighed the prejudice under section 352.

In the presence of the jury, Sanchez testified that a day or two after the shooting, he was getting out of his car in front of Gandara's driveway. Gandara and appellant were

in the driveway, about six feet away. He heard Gandara ask appellant "'Why did you shoot her?'" When the prosecutor asked if he remembered Gandara saying "'You weren't supposed to shoot her,'" Sanchez said "Right." He testified that appellant did not say anything in response. Appellant did not deny the shooting or say he did not know what Gandara was talking about. Gandara told appellant to leave and he did.

B. Legal Principles

We review a trial court's ruling on the admissibility of evidence for abuse of discretion. (*People v. Scott* (2011) 52 Cal.4th 452, 491.) "The law pertaining to adoptive admissions is well settled. 'Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth.' (Evid. Code, § 1221.) As this court has explained, '[i]f a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution, and he fails to speak, or he makes an evasive or equivocal reply, both the accusatory statement and the fact of silence or equivocation may be offered as an implied or adoptive admission of guilt.' [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 661 (*Jennings*).)

The *Jennings* court described the classic example of an adoptive admission as an """accusatory statement to a criminal defendant made by a person *other* than a police officer, and defendant's conduct of silence, or his words or equivocal and evasive replies in response."""" (*Jennings, supra*, 50 Cal.4th at p. 661.) The court explained: """With knowledge of the accusation, the defendant's conduct of silence . . . lead reasonably to the inference that he believes the accusatory statement to be true." [Citation.]' (*People v. Silva* (1988) 45 Cal.3d 604, 623-624.)" (*Ibid.*) But a direct accusation is not required. (*Ibid.*) """When a person makes a statement in the presence of a party to an action under circumstances that would normally call for a response if the statement were untrue, the statement is admissible for the limited purpose of showing the party's reaction to it.

[Citations.] His silence, evasion, or equivocation may be considered as a tacit admission of the statements made in his presence." [Citation.]' ([*People v.*] *Riel* [(2000)] 22 Cal.4th [1153,] 1189.)" (*Ibid.*)

A trial court determining whether a statement is admissible as an adoptive admission must first decide whether there is sufficient evidence that: "(a) the defendant heard and understood the statement under circumstances that normally would call for a response; and (b) by words or conduct, the defendant adopted the statement as true. [Citations.] " (*People v. Davis* (2005) 36 Cal.4th 510, 535.)

We conclude that both requirements were satisfied here. Sanchez was within six feet when Gandara made the statement to appellant that he was not "supposed to shoot her." Appellant and Gandara were standing close to each other when this statement was made. A normal response to this statement by an innocent person would be either to deny shooting anyone or to say that he did not know what Gandara was talking about because the statement was untrue. Instead, appellant remained silent in the face of this accusatory statement. This is a classic adoptive admission. The trial court did not abuse its discretion in allowing its admission.

Appellant claims the admission of Gandara's statement violated his federal constitutional rights to due process and fair trial, as well as his Sixth Amendment right to confront the witnesses against him. Based on this argument, he contends the proper error analysis is that defined under *Chapman v. California* (1967) 386 U.S. 18, 24. Respondent argues that appellant's claims of a violation of his constitutional rights as a result of admission of Gandara's statement were forfeited because the only objection raised below was under section 352. As appellant points out in his reply brief, the written motion expressly asserted constitutional issues.[7]

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[7] In light of our conclusion that the constitutional issues were preserved, we need not and do not address issues raised by respondent regarding the propriety of the effort by defense counsel to "federalize" all evidentiary objections. This term was used by the trial court before trial began when defense counsel asked the court to deem any hearsay

Although the constitutional issues were preserved, they are without merit in light of our conclusion that the trial court did not err in admitting the Gandara's statement. (*People v. Cole* (2004) 33 Cal.4th 1158, 1197, fn. 8 [defendant's arguments that erroneous admission of evidence violated the right to due process failed because the evidence was properly admitted].)

III

Appellant argues the trial court erred in denying his motion for a mistrial when a prosecution witness volunteered she was employed by the probation department. On a motion in limine, the trial court had ruled that such evidence was inadmissible.

A. Relevant Proceedings

As part of its case in chief, the prosecution attempted to link a cell phone with the number 310-756-9469 to appellant using circumstantial evidence since no cell phone was found in appellant's name. Gandara's cell phone had this number in its address book, under the listing, "Riche". Telephone records admitted at trial demonstrated that numerous calls were made between Castro's cell phone and Gandara's cell phone on April 29, 2007. They also established numerous calls between Gandara's cell phone and the 310-756-9469 number on April 29, 2007 from 10:54 p.m. to 11:16 p.m., and then two calls made the following morning. The pattern of calls between Gandara's phone and the phone used by appellant would support an inference that appellant and Gandara were planning to rob Castro and Coronado during the attempted drug sale.

The investigating detective contacted appellant's probation officer, Kimberly McKinney, who told him appellant gave her the 310-756-9469 number as his contact number. The defense and prosecution attempted without success to reach a stipulation that this was the number provided by appellant as a contact number. The trial court

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objection to also be on the grounds of the Sixth Amendment right to confrontation and to cross-examination. The prosecutor declined to comment on this request. The trial court said it would deem the objections to include the federal grounds without the need for defense counsel to expressly state them.

sustained an objection to the probation officer's testimony in part. Rather than identifying herself as a probation officer, the trial court ruled that the witness would be allowed to testify that she works for the State of California, that appellant was obligated to contact her regularly, and gave her the number as his contact number. The prosecution asked for permission to talk with the witness, which was granted.

On direct examination, the prosecutor asked McKinney: "Q. Ms. McKinney, do you work for the State of California?" McKinney responded: "A. The Los Angeles County Probation Department." Testimony was elicited that she knew appellant, he was legally obligated to provide him with contact numbers, and in April 2007, she had a contact number for appellant of 310-756-9469. McKinney testified that she had called appellant at this number and he had answered.

A sidebar colloquy followed. The court said it was sure that the prosecutor had admonished the witness to avoid identifying herself as a probation officer and the prosecutor said she had. Defense counsel moved for a mistrial, saying that there was "no way to unring that bell." He indicated that the court would have to rule on the prejudice to appellant, since the jury now knew that he had been convicted of a crime, although the nature of that crime was unknown. Defense counsel expressed concern that the jury would speculate about the nature of the crime which led to appellant being on probation. He argued that the information about probation was highly prejudicial because it was a close case turning on issues of credibility. Defense counsel asserted "[T]his could be the very thing that puts the jury over the edge." In the event that his motion for a mistrial was denied, defense counsel suggested that the jury be admonished and each jury asked individually, one at a time, whether this evidence would prejudice them, and then to individually admonish the jurors to disregard the statement as irrelevant.

The prosecutor reiterated that she had admonished the witness not to mention she is a probation officer, and said she assumed the answer was a matter of habit. The witness confirmed this explanation and apologized to the court. The prosecutor argued an admonition would cure any prejudice to appellant. The court observed that the question should have been framed as to whether the officer worked for the County of Los

Angeles since she is not an employee of the State of California. It declined to declare a mistrial, concluding that, in context, the statement was not unduly prejudicial. The jury returned to the courtroom and was admonished: "Ladies and Gentlemen, you remember at the beginning when we were selecting jurors, I told you not to speculate about stuff? Well, I don't want you to speculate about something. [¶] You heard testimony just a minute ago as to who this witness, Ms. McKinney, works for. I don't want you speculating on the basis of who she works for . . . [¶] Can you all do that? Can you all disregard that testimony and not speculate as to what it means? [¶] If anybody can't do that, please raise their hand. [¶] Does anybody want to talk to me in private about this? That means with the other jurors excused. [¶] Everybody is comfortable that they can disregard this? [¶] I see no hands. Thank you. [¶] You may proceed."

B. Analysis

"We review a ruling on a mistrial motion for an abuse of discretion. [Citations.] A trial court should declare a mistrial only '"if the court is apprised of prejudice that it judges incurable by admonition or instruction."' [Citation.] 'In making this assessment of incurable prejudice, a trial court has considerable discretion.' [Citation.]" (*People v. Lewis* (2008) 43 Cal.4th 415, 501 (*Lewis*).) In *Lewis*, the defendant argued the trial court erred in denying his motion for a mistrial after a deputy sheriff testified about the service of a search warrant on the apartment where the defendant and codefendants lived. The deputy said "'*We had information that they were ex-cons* and there was a possibility that they would try to shoot it out with the cops.'" (*Ibid.*) The Supreme Court held that the testimony did not result in prejudice that was incurable by admonition. It reasoned that the testimony was not elicited by the prosecutor, was not followed by any additional testimony regarding the defendant's prior record, and did not identify which of the occupants of the apartments were believed to be ex-cons. On this record, the court concluded that the testimony "likely was inconsequential in the minds of the jurors when compared to the strong evidence supporting defendant's guilt" of the charged crimes, including multiple murders. (*Ibid.*)

Significantly, in *Lewis*, the Supreme Court ruled that even if the testimony should not have been before the jury, the trial court cured any error by admonishing the jury that the testimony did not establish any fact regarding the defendants' prior record. (*Lewis, supra,* 43 Cal.4th at pp. 501-502.) It concluded: "Under these circumstances 'the court could reasonably conclude that any potential for prejudice was so minimal that it was cured by the admonition and a mistrial should not be granted.' [Citation.]" (*Id.* at p. 502.)

People v. Leavel (2012) 203 Cal.App.4th 823, also is instructive. In that case, a sheriff's deputy was asked to write a search warrant for a DNA swab from the defendant. He testified that he asked a detective to serve the search warrant at a detention center. The trial court called a recess and chastised the prosecutor for inquiring into both the defendant's custody status and the fact that he was on parole. The prosecutor responded that he did not anticipate that the deputy would reveal the defendant's whereabouts when the warrant was served. The defendant's motion for a mistrial was denied and the jury was admonished to disregard the testimony. (*Id.* at p. 831.) The Court of Appeal concluded that the single reference to the detention center was easily cured by striking the evidence and admonishing the jury to disregard it. (*Ibid.*) The court applied the presumption "that the jury followed the court's admonishment (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 173)," which had not been rebutted. (*Ibid.*) In addition, the court observed that the evidence against the defendant was overwhelming. The court concluded that it was not within the realm of probability that defendant could have secured a more favorable result had the statement not been made. (*Ibid.*)

Appellant relies on *People v. Allen* (1978) 77 Cal.App.3d 924. In that case, Allen and a minor were charged with robbing a woman at gunpoint. The victim and her husband, who also saw the robbery, identified the minor as one of the robbers at a field identification. Two jail inmates told the police that Allen admitted his participation in the robbery to them, hoped to avoid identification by changing his hair, and hoped to get his sister to talk the minor into taking responsibility for the crime. Their statements were played to the jury at trial. (*Id.* at pp. 928-929.) The minor testified against Allen and said

that Allen had the gun during the robbery. The minor's mother testified for the prosecution that Allen's sister had said she was willing to lie in court to help him. The sister denied this in her testimony. On rebuttal, the minor's mother said that Allen's sister told her that Allen was on parole. Allen testified and denied culpability or making the statements about which the inmates testified. His sisters corroborated his alibi defense. (*Id*. at p. 929.) Despite an admonishment by the jury to ignore the reference to Allen's parole status, the Court of Appeal found the evidence prejudicial on the ground that it was "an extremely close case in which the jury had to make its fact determination based upon the credibility of [Allen] and his witnesses and on the credibility of the prosecution's witnesses. In the light of these facts, it is reasonably probable that a result more favorable to [Allen] would have been reached had the prejudicial information of [Allen's] parole status not been divulged to the jury. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)" (*Id*. at p. 935.)

We disagree with appellant's characterization of the evidence against him as close. On May 7, 2007, police officers saw appellant reach into his waistband and toss a pistol over his shoulder. The firearm was recovered and linked through ballistics testing to the casing found at the scene of these offenses. Sanchez identified appellant as the shooter. Appellant had an opportunity to examine Sanchez regarding inconsistencies in his statements to investigating officers about the crime including appellant's role in it. Appellant was also able to bring out evidence that Sanchez did not identify the shooter until after his own arrest on a parole violation. In addition, the jury was told that Sanchez had been relocated for his safety. The telephone records of Gandara's cell phone showed numerous calls between Gandara's phone and a phone used by appellant shortly before the shootings. The jury also heard recordings of telephone calls made by appellant from jail attempting to have an alibi arranged for him and complaining about the testimony of a snitch (Sanchez).

Appellant's defense was that the shooting was committed by Centeno, rather than appellant, based on the testimony of their sister Coreena Gomez. But on cross examination, she admitted that she did not tell anyone, including family members, about

the conversation in which Centeno admitted his guilt, until after she spoke to defense counsel shortly before she testified.

Although he acknowledges that the harmless error standard applied in such situations is the standard formulated in *People v. Watson*, *supra*, 46 Cal.2d 818, appellant asserts that the higher standard of *Chapman v. California*, *supra*, 386 U.S. 18, should apply because "the mistrial motion implicates the presumption of innocence . . . ." We disagree. Appellant has not cited any authority which directly supports his contention that McKinney's statement undermined the presumption of innocence. The trial court immediately and appropriately admonished the jury and inquired as to whether any juror needed to discuss the matter or would have trouble following the admonishment. Appellant has not rebutted the presumption that the jury followed the court's admonishment that it was to disregard McKinney's reference to the probation department. The court here took the additional measure of inquiring as to whether any juror would have difficulty abiding by the admonishment, or even needed to discuss the matter outside the presence of other jurors. Appellant's contention that the jury was likely to use the information about his obligation to be in contact with a probation officer "in an impermissible manner, namely to conclude that appellant was the type of person who was a criminal and an individual 'of generally bad character, an immoral person unworthy of the jury's belief or consideration' (*People v. Sam* (1969) 71 Cal.2d 194, 206.)" is speculation insufficient to overcome the presumption we apply.

On this record, we conclude that the brief reference to McKinney's employment at the probation department was not prejudicial. There is no reasonable probability that appellant would have obtained a better result if the information had not been divulged. This conclusion is supported by *People v. Harris* (1994) 22 Cal.App.4th 1575, a case cited by appellant. *Harris* was a robbery case against two defendants in which the victim's girlfriend testified. She was asked how many times she had discussed the case with the victim. In replying, she said they had talked about it "'because [the defendants'] parole officers were calling and everything and I was just nerved up—[.]'" (*Id*. at p. 1580.) Defense counsel immediately sought a mistrial. The trial court denied the

motion and instructed the jury to disregard the statement and not to consider it for any purpose. (*Ibid.*) The Court of Appeal concluded that any error was harmless in light of overwhelming evidence of the defendant's guilt. It applied the *Watson* standard of error and held that it was not reasonably probable that the result would have been more favorable had the incidental remark not been made. (*People v. Harris*, at p. 1581.)

IV

Appellant argues the trial court erred by allowing evidence of two uncharged incidents under section 1101, subdivision (b) to prove common plan and scheme and intent. He contends the incidents were not sufficiently similar to the present offenses and that any probative value was outweighed by the prejudicial impact of the evidence.

A. Relevant Proceedings

Defense counsel moved in limine to exclude evidence of a prior uncharged offense on the ground that the evidence would be more prejudicial than probative. Although the motion cited authority regarding the admissibility of such evidence under section 1101, subdivision (b), no particular prior uncharged offense was identified. Instead, the motion said: "The defendant's uncharged priors are not sufficiently distinct to warrant admissibility."

The prosecution responded with its own authority in support of the admission of three uncharged acts on the issues of intent and motive under section 1101, subdivision (b). Since ultimately evidence of only two of these incidents was presented to the jury, we do not discuss the third. The first incident (Jimenez incident) was on February 1, 2007, two months before the Castro shooting. Gerardo Jimenez was leaving a restaurant in Wilmington at 3:30 a.m. Appellant pointed a gun at him and told him "'gimme your fucking keys or I'll smoke you[.]'" Jimenez, in fear for his life, complied and appellant drove off in his car.

The second incident (Costales incident) occurred on March 18, 2007, when Eric Costales arranged by telephone to meet someone at a gas station in Carson to sell him marijuana. When he arrived at the station, appellant entered the car and Costales gave him a bag of marijuana. Appellant pointed a gun at him and demanded money. Costales

was forced to take appellant to his home at gun point to obtain more money. Two other men with appellant followed in a car registered to appellant's aunt. Appellant took money and a cell phone from Costales. After Costales reported the robbery to the police, appellant called him and threatened to have him killed if he did not drop the charges.

The prosecution's motion argued that the Jimenez and Costales incidents were relevant to prove that appellant planned to rob Castro in this case, and that a conspiracy to rob her had been formed before the actual shooting. In addition, the prosecution argued that the prior incidents demonstrated that appellant intended to use lethal force if a robbery victim resisted, and that he followed through with that intent when Castro resisted and tried to flee. The prosecution also argued that the evidence should not be excluded as more prejudicial than probative under section 352.

In reply, appellant argued the prior bad acts lacked sufficient similarity and were not relevant to prove intent or motive. He also informed the court that he was awaiting trial for the offenses the prosecution sought to admit in this case, which would result in three trials within the trial and take up significant time. He also contended that the defense was not ready to address the prior acts because each was an open case still requiring defense investigation. Appellant was being represented in all cases by the same retained counsel, who had agreed with the prosecutor to try the present case immediately after finishing other substantial matters and before the Jimenez and Costales incidents. Defense counsel claimed surprise at the prosecution's effort to use the incidents in this matter.

After lengthy argument, the trial court ruled that defense counsel had had the other cases for quite a while. It concluded defense counsel had notice of all three incidents since the case in which they were charged was set to go to trial immediately at the conclusion of this case with the same defense counsel representing appellant. The court found the evidence admissible as to intent, and not unduly prejudicial under section 352. Appellant's motions for a continuance and a mistrial were denied.

Appellant filed a new motion for mistrial, or in the alternative, for exclusion of the evidence admitted under section 1101, subdivision (b) with an admonition to the jury to

disregard it after testimony of the uncharged offenses was admitted. He also sought a continuance to investigate the section 1101, subdivision (b) witnesses. Appellant argued that the admissibility of the prior acts evidence on the basis of a common plan or scheme was not thoroughly briefed or argued because of ambiguities in the prosecution's motion. In light of the testimony admitted under section 1101, subdivision (b), appellant contended that the evidence did not demonstrate a common plan or scheme because sufficient similarity with the present offenses was not established. The trial court ruled that the matter had been extensively litigated previously and denied the motion.

The jury was instructed with CALCRIM 375 regarding uncharged offenses.[8]

B. Prior Acts Testimony

1. Jimenez Incident

Jimenez testified that he finished his shift as a truck driver at 2:30 a.m. on February 1, 2007 and decided to go with two others to eat at a Mexican restaurant. When they had finished, the group sat inside the car Jimenez was driving for seven to ten minutes. Jimenez identified appellant as the man who came up to him with an automatic firearm and said "'Give me your keys.'" At first appellant just pointed the weapon, then he slid the top back. Appellant then repeated his demand for the car keys more aggressively and said he would shoot Jimenez if he did not surrender the keys.

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[8] In relevant part, the instruction advised the jury of the limited purposes for which the uncharged offense evidence could be used. It stated that the evidence could be considered only if the prosecution proved by a preponderance of the evidence that appellant committed the uncharged acts. In addition, it stated: "If you decide that the defendant committed the uncharged offenses, *you may, but are not required to, consider that evidence for the limited purpose of deciding* whether or not: the defendant acted with an intent to commit murder and/or attempted murder . . . or . . . had a plan or scheme to commit the offenses alleged in this case. (Italics added.) The jury was warned that the evidence could not be considered for any other purpose and that it could not conclude that appellant has a bad character or is disposed to commit crime. Finally, the instruction stated that if it concluded that appellant committed the uncharged offenses, this was only one factor to be considered with all the other evidence, and is not sufficient by itself to prove that appellant is guilty of the charges in this case.

Concerned that he might be shot, Jimenez dropped the keys. Appellant walked toward him, pointing the gun which made Jimenez move to the other side of the car. Appellant grabbed the keys while keeping his eyes on Jimenez. Appellant then jumped into the car and took off. The car was recovered the next day stripped of wheels, lights, and other parts.

2. Costales Incident

Eric Costales testified that he was selling marijuana in March 2007. He received a telephone call from a person who wanted to meet at a gas station to buy marijuana. Costales drove to the station, parked, and waited. A silver Impala pulled up. Costales identified appellant as the person who got out of the car and got into the front passenger seat to complete the transaction. After talking briefly, Costales gave appellant the marijuana. Then appellant pulled out a gun, pointed it in his face, and told Costales he was being robbed.

At appellant's direction, Costales drove to his own home. Appellant kept repeating that this was a robbery and that he was going to shoot Costales. The gun was always pointed at Costales' face. Costales testified: "Then he cocked the gun back to tell me that there was one in the chamber, so he could show me the clip and that it was authentic." Costales saw the gun was loaded and feared for his life. Appellant told him to take him to the Costales home or he would shoot him. Costales drove to his home, followed by the silver Impala. Appellant and one of his friends accompanied Costales to the house. Costales told the men that appellant could have whatever he wanted from the house so that there was no need for two people to be inside. The other man waited outside the front door while appellant went inside with Costales. When Costales' phone rang, appellant demanded that he give it to him. Costales said he only had $5, and emptied his pockets to show appellant. Appellant and Costales then walked outside. At that point, appellant got more loud and aggressive, telling Costales not to look at him, to turn his back and repeating that he was going to shoot Costales. Costales said he would not do anything, and then appellant was gone. Appellant also told him not to contact the police because that would be a big mistake. Costales gave the license plate number of the

silver Impala to police officers. Later, Costales received telephone calls threatening him for reporting the robbery. The caller told Costales to drop the charges or he would send friends over to the Costales home.

C. Analysis

Section 1101, subdivision (b) provides for the admission of evidence that a person committed a crime "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .), other than his or her disposition to commit such an act." The degree of similarity required between the present and prior offenses under section 1101, subdivision (b) depends on the purpose for which the prior crimes evidence is offered. "When the prosecution seeks to prove the defendant's identity as the perpetrator of the charged offense with evidence he had committed uncharged offenses, the admissibility of evidence of the uncharged offenses turns on proof that the charged and uncharged offenses share sufficient distinctive common features to raise an inference of identity. A lesser degree of similarity is required to establish the existence of a common plan or scheme and still less similarity is required to establish intent. [Citations.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the defendant probably acted with the same intent in each instance. [Citations.]" (*People v. Lindberg* (2008) 45 Cal.4th 1, 23; see also *People v. Thomas* (2011) 52 Cal.4th 336, 354–356.) We review the trial court's decision on admission of other crimes evidence for abuse of discretion. (*People v. Lindberg, supra,* 45 Cal. 4th at p. 23.)

Appellant argues the prior acts evidence had marginal relevance to prove intent or common plan and scheme because they were not sufficiently similar to appellant's conduct in the current incident. He also contends the trial court abused its discretion in not excluding evidence of the prior crimes under section 352, which gives the court discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will necessitate undue time consumption or create substantial danger of undue prejudice, confusing the issues, or misleading the jury."

(*People v. Loy* (2011) 52 Cal.4th 46, 61.) The fact that the evidence tended to establish elements of the prosecution's case does not render it prejudicial for purposes of section 352. (*People v. Tran* (2011) 51 Cal.4th 1040, 1050.)

In *People v. Ewoldt* (1994) 7 Cal.4th 380, superseded by statute on other grounds as stated by *People v Britt* (2002) 104 Cal.App.4th 500, 505, the Supreme Court held that the least degree of similarity is required to prove intent: "In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant '"probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*People v. Ewoldt*, at p. 402.) In order to prove the existence of a common design or plan, the evidence of the uncharged misconduct "'must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are individual manifestations."' [Citation.]" (*People v. Foster* (2010) 50 Cal.4th 1301, 1328.)

"If evidence of prior conduct is sufficiently similar to the charged crimes to be relevant to prove the defendant's intent, common plan, or identity, the trial court then must consider whether the probative value of the evidence 'is "substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.)' [Citation.]" (*People v. Foster*, *supra*, 50 Cal.4th at p. 1328.) We review a court's rulings under sections 1101 and 352 for abuse of discretion. (*Ibid.*)

We find no abuse of the trial court's discretion in the admission of the Costales incident for common plan or design under section 1101, subdivision (b). That incident involved a drug sale robbery, where the victim was accosted in a car, appellant used a weapon and threats to force a person to drive him from the scene, and threats were later made to intimidate the person involved from pursuing charges or testifying against appellant. This brings us to the question whether the evidence should have been excluded as more prejudicial than probative under section 352. "'Evidence is not "unduly prejudicial" under the Evidence Code merely because it strongly implicates a

defendant and casts him or her in a bad light, or merely because the defendant contests that evidence and points to allegedly contrary evidence.' [Citation.]" (*People v. Jones* (2012) 54 Cal.4th 1, 61-62.)

We conclude that the trial court did not abuse its discretion in concluding that the evidence of the Costales incident was more probative than prejudicial under section 352. The source of the evidence of the Costales incident was independent of the evidence of the current offenses. (*People v. Tran, supra,* 51 Cal.4th at p. 1047.) In addition, the evidence regarding the Costales incident was far less inflammatory than the testimony regarding the charged offense. (*Ibid.*)

We reach a different conclusion as to the Jimenez incident on the ground there was insufficient similarity in the circumstances. It was not admissible to prove appellant's intent to rob Castro, which other evidence showed was beyond dispute. (See *People v. Lopez* (2011) 198 Cal.App.4th 698, 715-716.) In addition, the evidence was not sufficiently similar to establish a common plan or design. The trial court erred in admitting that evidence.

In determining whether any error in the admission of the uncharged crimes evidence was prejudicial, we apply the harmless error standard under *People v. Watson, supra,* 46 Cal.2d 818: whether it is reasonably probable that a result more favorable to the defendant would have been reached in the absence of the alleged error. (*People v. Thomas, supra,* 52 Cal.4th at p. 356.) The evidence against appellant in this case was overwhelming. Sanchez, who was present throughout the shooting and the aftermath, identified him as the shooter. A pattern of telephone calls between Gandara's phone and a phone used by appellant supported an inference that appellant arranged in advance with Gandara to rob Castro. The jury heard recordings of telephone calls made by appellant from jail in which he attempted to arrange an alibi and also complained about someone snitching on him about the crime. The testimony of appellant's sister, Coreena, that Ruben was the shooter, was thoroughly impeached. Under these circumstances, it is not reasonably probable that appellant would have received a more favorable result had evidence of the Jimenez incident not been presented to the jury. Appellant claims that the

admission of the prior acts evidence may have violated his federal constitutional rights to due process and effective counsel. Contrary to these claims, the asserted error "was not of such gravity as to amount to a denial of his 'due process right to a fair trial'" (*ibid.*) or his right to effective assistance of counsel.

V

Appellant contends that a combination of errors rendered his trial fundamentally unfair in violation of his rights under the 5th, 6th, and 14th amendments to the federal constitution. The single error in admitting evidence of the prior Jimenez incident was harmless. Appellant "was entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.)

DISPOSITION

The judgment of conviction is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.